

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**ILLINOIS COMMERCE COMMISSION
ON ITS OWN MOTION,**

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Docket No. 01-0539

**IMPLEMENTATION OF SECTION 13-712(g)
OF THE PUBLIC UTILITIES ACT.**

REPLY BRIEF ON EXCEPTIONS OF THE WIRELESS COALITION

June 27, 2003

John W. McCaffrey
Kathleen R. Pasulka-Brown
FOLEY & LARDNER
321 North Clark Street
Suite 2800
Chicago, Illinois 60610
(312) 832-4500

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REPLY BRIEF ON EXCEPTIONS OF THE WIRELESS COALITION

The Wireless Coalition, comprised of PrimeCo Personal Communications (n/k/a U. S. Cellular), U. S. Cellular and VoiceStream (n/k/a T-Mobile), through its counsel, hereby submits its Reply Brief on Exceptions to the Hearing Examiner's Proposed Order ("HEPO") and Hearing Examiner's proposed Part 731 rule ("Proposed Rule") in the Illinois Commerce Commission's ("Commission") proceeding to implement Section 13-712(g) of the Illinois Public Utilities Act ("Act), 220 ILCS 5/1-101, *et seq.*

I. INTRODUCTION

The Hearing Examiner correctly determined that, pursuant to Section 13-712(g) of the Act, the Commission should establish service quality rules and remedies for wholesale special access services. Wireless telecommunications carriers and others depend on such services to provide telecommunications services to Illinois consumers. However, due to the poor quality of the wholesale special access services currently provided by SBC/Ameritech and Verizon, the principle Illinois providers of such services, Illinois wireless telecommunications consumers have long experienced dropped calls, poor voice quality and other wholesale special access-related service problems. Thus, there is a significant need for service quality rules and remedies for wholesale special access services. The enactment of such rules and remedies will

incent SBC/Ameritech and Verizon to improve the quality of their wholesale special access services, which will result in better wireless telecommunications services for Illinois consumers and will promote the development of Illinois' telecommunications market.

Additionally, the Act plainly authorizes the Commission to establish rules and remedies for wholesale special access services. Specifically, it authorizes the Commission to "establish and implement carrier to carrier wholesale service quality rules and remedies", 220 ILCS 5/13-13-712(g), without restricting, in any way, the type of wholesale services the Commission may regulate. Therefore, the Commission can establish rules and remedies for any wholesale telecommunications services it deems appropriate, including wholesale special access services.

To promote the legislative goal of fully developing Illinois' telecommunications market, the Commission not only can but should enact rules and remedies for wholesale special access services. Doing so will enable carriers that depend on such services to more effectively and efficiently compete in Illinois' telecommunications market. Accordingly, the Commission should adopt the HEPO and the Proposed Rule, with the modifications the Wireless Coalition recommended in its Brief on Exceptions ("BOE") and with Staff's proposed modification of the HEPO's description of Staff's position regarding the definition of "wholesale services" (and a related modification of the definition of "wholesale special access services"). Staff's contention that the Commission's jurisdiction over wholesale services is not necessarily limited to intrastate services is plainly correct. Therefore, the Commission's Part 731 Rule should not be unduly restricted by limiting its applicability to "intrastate" wholesale services or "intrastate" wholesale special access services.

The Commission should not, however, accept Staff's proposed modification of the definition of "wholesale special access". Staff's proposed definition fails to encompass a number of essential aspects of the wholesale special access services on which carriers depend to provide wireless and other telecommunications services. As more fully explained herein, adoption of Staff's definition of "wholesale special access" would frustrate the purpose of enacting service quality rules for wholesale special access services and would not prompt SBC/Ameritech and Verizon to improve the overall quality of their wholesale special access services.

The Commission also should not accept any of SBC/Ameritech's or Verizon's exceptions to the wholesale special access services-related provisions of the HEPO and the Proposed Rule. SBC/Ameritech and Verizon fail to assert any arguments that have not already been carefully considered and properly rejected. Instead, they merely rehash unpersuasive arguments that are supported by neither the law nor the record.

Finally, the Commission also should reject SBC/Ameritech's request for leave to file its wholesale service quality plan ("Plan") 90 days after the effective date of the Commission's Part 731 Rule. SBC/Ameritech has been providing wholesale special access services for many years and has detailed tariffs governing such services.¹ Thus, SBC/Ameritech is fully capable of developing and filing a Plan on or before January 2, 2004, and in light of the significant delay that has occurred since the Commission initiated this Docket, both SBC/Ameritech and Verizon should be required to do so.

¹ However, SBC/Ameritech's wholesale special access services tariffs are not generally applicable and include only very limited remedies.

II. ARGUMENT

A. Staff's Proposed Definition of "Wholesale Special Access" Is Inadequate and Should Be Rejected

As the Hearing Examiner correctly found, the Wireless Coalition presented evidence showing that Staff's proposed definition of "wholesale special access" does not cover all of the connections such circuits are used to make, and no party, including Staff, "presented evidence or arguments indicating that the Wireless Coalition's argument is incorrect." (See HEPO at pp. 41-42.) Based on this finding, the Hearing Examiner adopted the Wireless Coalition's proposed definition of "wholesale special access". (See HEPO at pp. 41-42 and Proposed Rule at § 731.105.)

Staff takes exception to the Proposed Rule's definition of "wholesale special access" based on two grounds. First, Staff asserts that its testimony did not address the Wireless Coalition's proposed definition of "wholesale special access" because "the Wireless Coalition provided no rationale or explanation for the changes requested." (See Staff's BOE at p. 14.) This assertion is clearly erroneous. Second, Staff asserts that despite the testimony Wireless Coalition witness Lester Tsuyuki ("Tsuyuki") provided on cross-examination, Staff remains concerned that "the proposed changes are not adequately supported by the record, are vague and may be difficult to implement." (*Id.*) This assertion is plainly unfounded.

In Direct Testimony filed June 11, 2002, Wireless Coalition witness Tsuyuki testified that the Wireless Coalition's proposed changes to Staff's definition of "wholesale special access" were necessary because Staff's definition is incomplete and, therefore, not workable. As Tsuyuki explained, Staff's definition "only encompasses part of the critical wholesale special access services that wireless telecommunications

carriers utilize to provide service to their customers.” (See Wireless Coalition Ex. 3.0 at 3:59-63.) Tsuyuki further explained as follows:

[W]ireless telecommunications carriers utilize wholesale special access services to transport voice and/or data from their base stations to their switch, which then forwards the transmission to its intended point of termination. This “backhaul” function, i.e., the transportation of information from base station to switch, is accomplished using wholesale special access circuits as well as the network of the provisioning carrier. A special access circuit is used to connect[] a wireless carrier’s base station to a provisioning carrier’s point of interface (“POI”) or a network interface device (“NID”) that links the wireless carrier’s network to the provisioning carrier’s network. Once the voice and/or data being transmitted over the special access circuit reaches the provisioning carrier’s network, that information is then carried over the provisioning carrier’s network to the wireless carrier’s switch.

Although the definition of “Wholesale Special Access” included in the Proposed Rule encompasses the connection between a wireless carrier’s base station and a POI or NID, it does not encompass the transportation over the provisioning carrier’s network to the wireless carrier’s switch. Thus, the proposed definition of “Wholesale Special Access” does not encompass the intra-network connections for which wireless carriers utilize wholesale special access services (i.e., backhaul service). It also fails to encompass other uses of wholesale special access services by wireless carriers.

The definition of “Wholesale Special Access” also should be revised because it excludes a significant portion of the wholesale special access services utilized by CLECs. For example, CLECs use wholesale special access circuits to connect their customers to a CLEC POI or NID. The proposed definition of “Wholesale Special Access” does not encompass this use of wholesale special access service.

(See Wireless Coalition Ex. 3.0 at 3:64 - 4:86 (emphasis added).)

During the hearing in this Docket, Tsuyuki again testified that Staff’s definition of “wholesale special access” does not encompass all of the special access services used by wireless carriers. (See Tsuyuki 8/13/02 Tr. at 874:21 - 875:4.)

As he explained:

when you break down a circuit and you say from a customer network interface device to a POI of the [provisioning] carrier [*i.e.*] the telco demark . . . that does not even include the local loop facilities provided by the provisioning carrier.

So when you read [Staff's] definition, it only includes a wiring from our equipment to the telco demark the way it is written. Our definition includes those network elements that include the local loop, interoffice facilities, point-to-point facilities, interLATA intrastate services, and also other carrier networks.

(See Tsuyuki 8/13/02 Tr. at 874:5-18.) Importantly, Tsuyuki confirmed that the above-described transmission path constitutes the entire path between a wireless carrier's cell site and its switch – which is the essential high speed connection that wholesale special access services are needed and used to provide – rather than just a portion of that path – which is all that is encompassed by Staff's definition of “wholesale special access”. (See Tsuyuki 8/13/02 Tr. at 874:19-22.) Finally, on cross-examination, Tsuyuki also testified about each of the various connections that “wholesale special access” circuits are used to make. (See Tsuyuki 8/13/02 Tr. at 835:3 – 837:13.)

The foregoing positively demonstrates that the Wireless Coalition fully explained and supported its proposed definition of “wholesale special access” and specifically identified the points at which such services originate and terminate. It shows that the definition included in the Proposed Rule is necessary and proper, because it encompasses all of the components of the wholesale special access services on which wireless carriers rely to provide wireless telecommunications services. It also shows why Staff's proposed definition of “wholesale special access” is inadequate. Accordingly, the Commission should retain the definition of “wholesale special access” included in the Proposed Rule and should reject Staff's proposed modification.

B. The HEPO's Description of Staff's
Position Regarding the Definition of
"Wholesale Services" Should Be Modified and
the Commission Should Make a Corresponding
Change in the Definition of "Wholesale Special Access"

In its Brief on Exceptions, Staff recommends that the Commission revise the HEPO's description of Staff's position regarding the definition of "wholesale services". (See Staff's BOE at pp. 5-7 and Attachment A thereto at p. 7.) Staff supports its recommendations by explaining that the Commission's jurisdiction over wholesale special access services is not necessarily limited to intrastate services and, in the future, the FCC may expressly expand the Commission's jurisdiction to encompass interstate wholesale special access services. (See Staff's BOE at p. 6 and Attachment A thereto at p. 7.) Staff's argument is correct, and the Wireless Coalition fully supports Staff's recommendation.

Further, the Wireless Coalition notes that based on Staff's argument, the word "intrastate" should be deleted from the definition of "wholesale special access". The Commission's Part 731 Rule should apply to any and all "wholesale special access" services over which the Commission has or may have jurisdiction. Accordingly, the first two lines of the Proposed Rule's definition of "wholesale special access" should be revised to state:

"Wholesale special access" means a wholesale service
utilizing a dedicated non-switched transmission path used
for carrier-to-carrier services

(See Proposed Rule at § 731.105.)

Also, the last paragraph on page 29 of the HEPO and the lines of that paragraph that continue on page 30 should be stricken. Specifically, the Commission should strike the paragraph that states:

(See HEPO at pp. 29-30.)

C. SBC/Ameritech's and Verizon's
Rehashed Contentions in Opposition to
Wholesale Special Access Services-Related
Rules and Remedies Should Be Summarily Rejected

SBC/Ameritech and Verizon fail to assert any contentions regarding wholesale special access services that have not already been considered and properly rejected. Instead, they merely reiterate and rehash erroneous arguments that the Wireless Coalition, Staff and others dispositively refuted, arguments that also were considered and rejected by the Hearing Examiner. (See Initial Brief of the Wireless Coalition; Reply Brief of the Wireless Coalition.) For instance, as found in the HEPO, well-settled rules of statutory construction prohibit the Commission from reading exceptions, limitations or conditions into Section 13-712(g). (See HEPO at p. 34 (citing *Divane v. Chicago Board of Education*, 332 Ill. App. 3d 548, 553, 774 N.E.2d 361 (1st Dist. 2002); *People v. Young*, 92 Ill.2d 236, 241, 441 N.E.2d 641 (1982)).) Thus, the Hearing Examiner properly declined to construe the phrase “wholesale service”, as used in Section 13-712(g), to mean: (i) all wholesale services *except* wholesale special access services, or (ii) only those wholesale services used to provide basic local exchange services. (See HEPO at pp. 34-36.) The Hearing Examiner also rejected such interpretations of Section 13-712(g) based on the Legislature’s telling decision to expressly limit subsections (c) through (f) of Section 13-712 to basic local exchange service and *not to limit* subsection (g) of Section 13-712 to basic local exchange service. (See HEPO at p. 34-35.)

The Hearing Examiner also correctly rejected the other arguments that SBC/Ameritech and Verizon reassert regarding wholesale special access services in their Briefs on Exceptions, including those described below:

- The Hearing Examiner correctly rejected Verizon’s contention that the Commission’s initiating order limits this proceeding to basic local exchange service. (See HEPO at p. 35; *se also* Wireless Coalition Brief at pp. 2-3.)

- The Hearing Examiner correctly determined that Verizon failed to refute the evidence of its poor quality wholesale special access services. (See HEPO at p. 35-36 and 39-40.) Verizon merely presented assertedly contrary evidence and proclaimed it superior. Moreover, the service Verizon touts as good is poor, as Wireless Coalition witnesses attested and as demonstrated by comparing it to wholesale special access performance for which SBC/Ameritech offers remedies. Verizon suggests that timely installation of most circuits is adequate. (See Verizon BOE at p. 15.) SBC/Ameritech claims to grant credits whenever it misses installation due dates on tariffed wholesale special access services. (SBC/Ameritech BOE at p. 17.) Verizon suggests that many hours of circuit outages is non-problematic. (Verizon BOE at p. 15.) SBC/Ameritech claims to grant credits when “individual [tariffed wholesale special access] circuits . . . are out of service for one minute or more” (SBC/Ameritech BOE at p. 17.) Verizon suggests that repair times exceeding 7 hours are not objectionable. (Verizon BOE at p. 16.) SBC/Ameritech claims to grant credits when it takes longer than 3 hours to restore service on failed DSO wholesale special access circuits purchased through its tariff. (SBC/Ameritech BOE at p. 17.)

- The Hearing Examiner correctly found that no party provided any facts to show that the Commission’s regulation of wholesale special access services may conflict with potential FCC rules regarding interstate wholesale special access services. (See HEPO at p. 29.) Indeed, the evidence was to the contrary. (See *e.g.*, Staff’s BOE at p. 6.)

- The Hearing Examiner correctly declined to accept SBC/Ameritech's contention that Section 13-712(b)'s exclusion of "advanced services" suggests that wholesale special access services are outside the scope of this proceeding. (See HEPO at p. 33-35.) As the Wireless Coalition demonstrated, wholesale special access services are *not* "advanced services". (See October 18, 2002 Reply Brief of the Wireless Coalition at p. 4 and fn. 2.)

- The Hearing Examiner correctly determined that SBC/Ameritech's current performance reports and the limited remedies it offers to customers who purchase wholesale special access services out of SBC/Ameritech's tariffs are not adequate substitutes for comprehensive, generally applicable performance measures, standards and remedies for wholesale special access services. (See HEPO at p. 39-40 and Proposed Rule at §§ 731.305 and 731.310.)² This determination is further supported by the fact that SBC/Ameritech's performance reports do not include sufficient performance measures and do not include any performance standards. (See October 18, 2002 Reply Brief of the Wireless Coalition, Ex. 1 at p. 2; Wireless Coalition Ex. 3.0 at 12:257-58; SBC/Ameritech Ex. 1.0 at 20:492-95.) Also, SBC/Ameritech has no generally applicable remedy provisions. Further, SBC/Ameritech's performance reports are confidential, *i.e.*, they are not submitted to this Commission.³

- As previously held, SBC/Ameritech's alleged attempts to improve its wholesale special access services are no reason to exclude wholesale special access

² Notably, the fact that Ameritech now has a 271 Plan does not provide any reason to alter this conclusion. Like SBC/Ameritech's prior plan, its 271 Plan does not include performance measures, standards or remedies for wholesale special access services. (See SBC/Ameritech's BOE at p. 3.)

³ Verizon does not even provide performance reports to its wholesale special access customers. (See Wireless Coalition Ex. 6.0 at 8:147-49; Verizon witness Jerry Holland, 7/23/02 Tr. 225:19-20.)

services from the Commission's Part 731 Rule. (See HEPO at p. 40.) On the contrary, such efforts reveal SBC/Ameritech's knowledge of the fact that its wholesale special access services need improvement. (*Id.*) Thus, including wholesale special access services in the Rule will provide a concrete incentive for SBC/Ameritech to achieve its goal of improved service.

- Based on the Hearing Examiner's correct determination that Section 13-712(g) is not limited to wholesale services used to provide basic local exchange service, SBC/Ameritech's unsupported claim regarding the nature of wholesale special access services is irrelevant. It simply does not matter whether wholesale special access services "are provided to carriers primarily for long-distance and wireless services, neither of which qualifies as basic local exchange service". (See Ameritech BOE at p. 20.) There is no requirement that a service constitute a basic local exchange service to fit within the scope of Section 13-712(g).

- The Hearing Examiner correctly rejected Verizon's request for a waiver provision that would allow any Level 1 carrier to be exempt from any requirement of the Commission's Part 731 Rule. (See HEPO at pp. 26-27.) Verizon's claim that such a provision could not lead to abuse because the Commission, prior to granting a waiver, would consider the adequacy of the carrier's wholesale special access services and whether the Commission had received any complaints about that service (Verizon BOE at pp. 19-20) misses the point. Any abuse that occurred would occur after the Commission issued a waiver, not before.

- Finally, Verizon completely misapprehends the import of the section of the HEPO discussing Verizon's and SBC/Ameritech's failure to seek to exclude evidence regarding wholesale special access services. In noting that Verizon and Ameritech could have sought to use "basic legal tools available to them to exclude the

evidence that they felt exceeded the scope of this docket”, the Hearing Examiner was not suggesting that such efforts would have been successful. Rather, the Hearing Examiner was calling into question the sincerity of the Level 1 carriers’ contention that wholesale special access services are outside the scope of this proceeding. As stated in the HEPO, if Verizon (or SBC/Ameritech) had actually believed that such services were outside the scope of this proceeding, it would have taken action to try and prevent the introduction of evidence regarding wholesale special access services. (See HEPO at p. 36.) Verizon’s (and SBC/Ameritech’s) failure to act shows that its claim in this regard is a red-herring.

D. Level 1 Carriers Should Not Be Granted
Leave to File Plans 90 Days After the
Effective Date of the Commission’s Part 731 Rule

As recommended in the Wireless Coalition’s Brief on Exceptions, the Commission should require Level 1 Carriers to file their wholesale service quality plan tariffs on or before January 2, 2004. (See Wireless Coalition BOE at pp. 17-19.) SBC/Ameritech argues that it should be granted leave to file its Plan 90 days after the effective date of the Commission’s Part 731 Rule, arguing that the initially proposed Plan filing date of April 1, 2003 has passed. (See SBC/Ameritech’s BOE at 24.) As set forth below, SBC/Ameritech’s request is unreasonable. It also is based on the false premise that the proposed Plan filing date has passed. It has not. The Proposed Rule

requires Level 1 carriers to file their Plan tariffs on or before April 1, 2004.

SBC/Ameritech's request should be denied.⁴

SBC/Ameritech admits that it has long been providing and reporting, at least summarily, on its performance of wholesale special access services. (See SBC/Ameritech's BOE at p. 17.) SBC/Ameritech utilizes essentially the same reporting measures that the Wireless Coalition recommends the Commission include in the Proposed Rule (see Wireless Coalition BOE, Appendix at p. 1), and SBC/Ameritech already has corresponding business rules. SBC/Ameritech also already has automated systems in place that track its performance of wholesale special access services.

In view of the already lengthy period of time that has passed since the Commission initiated this Docket (see Wireless Coalition BOE at p. 17-19; Commission's Initiating Order issued August 8, 2001) and the minimal effort that would be required for SBC/Ameritech to prepare and add standards and remedies and previously established performance measures for wholesale special access services to its existing wholesale service quality plan, the Commission should order SBC/Ameritech (and Verizon) to file its Plan on or before January 2, 2004.

III. CONCLUSION

For the reasons stated herein, and those stated in the Wireless Coalition's Brief on Exceptions and in the record, the Wireless Coalition respectfully requests that the Commission adopt the HEPO and the Proposed Rule issued by the Hearing Examiner

⁴ In a last minute e-mail sent the day before the filing deadline for this Reply Brief on Exceptions, counsel for SBC/Ameritech acknowledged SBC/Ameritech's repeated misstatement of the filing date in the Proposed Rule. Counsel also indicated that SBC/Ameritech will withdraw the exception based on its errant statement. Regardless of any action SBC/Ameritech may take in this regard, the Commission should require SBC/Ameritech to file its Plan on or before January 2, 2004.

with: (i) the modifications recommended in the Wireless Coalition's Brief on Exceptions, (ii) Staff's proposed modification of the HEPO's description of Staff's position regarding the definition of "wholesale services", and (iii) as set forth herein, the corollary deletion of the word "intrastate" from the definition of "wholesale special access" along with the HEPO's brief discussion of this point.

Dated: June 27, 2003

Respectfully submitted,

PRIMECO PERSONAL COMMUNICATIONS
(n/k/a U. S. CELLULAR)
U. S. CELLULAR
VOICESTREAM WIRELESS (n/k/a T-MOBILE)

By _____
One of Its Attorneys

John W. McCaffrey
Kathleen R. Pasulka-Brown
FOLEY & LARDNER
321 North Clark Street
Suite 2800
Chicago, Illinois 60610
(312) 832-4500

PROOF OF SERVICE

I, Kathleen R. Pasulka-Brown, one of the attorneys for the Wireless Coalition (PrimeCo Personal Communications (n/k/a U. S. Cellular), U. S. Cellular and VoiceStream (n/k/a T-Mobile), hereby certify that a copy of the foregoing Reply Brief on Exceptions of the Wireless Coalition was filed on e-docket and copies were served on each of the persons on the attached Service List, at the addresses specified, by e-mail, from 321 North Clark Street, Chicago, Illinois 60610, on June 27, 2003.

Kathleen R. Pasulka-Brown

SERVICE LIST
ICC DOCKET NO. 01-0539

Claudia Sainsot
ADMINISTRATIVE LAW JUDGE
ILLINOIS COMMERCE COMMISSION
160 N. LASALLE, C-800
CHICAGO, IL 60601
Csainsot@icc.state.il.us

Terri L. Brieske
ATTY. FOR INTERVENORS
SCHIFF HARDIN & WAITE
6600 SEARS TOWER
CHICAGO, IL 60606
tbrieske@schiffhardin.com

Edward J. Cadieux
VICE PRESIDENT
MIDWEST REGULATORY
NUVOX COMMUNICATIONS
OF ILLINOIS, INC.
16090 SWINGLEY RIDGE RD., STE. 500
CHESTERFIELD, IL 63017
ecadieux@nuvox.com

Matt C. Deering
ATTY. FOR IITA
MEYER CAPEL, A
PROFESSIONAL CORPORATION
306 W. CHURCH ST.,
PO BOX 6750
CHAMPAIGN, IL 61826-6750
mdeering@meyercafel.com

Joseph E. Donovan
ATTY. FOR ILLINOIS RURAL
COMPETITIVE ALLIANCE
O'KEEFE, ASHENDEN, LYONS
& WARD
30 N. LASALLE ST., STE 4100
CHICAGO, IL 60602
Jedonovan@oalw.com

Douglas A. Dougherty
ILLINOIS TELECOMMUNICATIONS
ASSOCIATION, INC.
PO BOX 730
300 E. MONROE ST., STE. 306
SPRINGFIELD, IL 62705
ddougherty@ameritech.net

Carmen Fosco
OFFICE OF GENERAL COUNSEL
160 N. LASALLE ST., STE. C-800
CHICAGO, IL 60601-3104
cfosco@icc.state.il.us

Hans Germann
ATTY. FOR ILLINOIS BELL TELEPHONE COMPANY
MAYER, BROWN, ROWE & MAW
190 SOUTH LASALLE STREET
CHICAGO, IL 60603
hgermann@mayerbrownrowe.com

John Gomoll
AT&T
222 W. ADAMS – FL. 15
CHICAGO, IL 60606
Gomolj@att.com

Paul J. Rebey
FOCAL COMMUNICATIONS
CORPORATION
SUITE 800
200 N. LASALLE
CHICAGO, IL 60601
prebey@focal.com

Michael Guerra
ATTY. FOR VERIZON
NORTH/SOUTH INC.
SONNENSCHN NATH & ROSENTHAL
8000 SEARS TOWER
CHICAGO, IL 60606
mguerra@sonnenschein.com

William A. Haas
MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.
6400 C ST., S.W.
PO BOX 3177
CEDAR RAPIDS, IA 52406-3177
whaas@mcleodusa.com

Cheryl Hamill
ATTORNEY
LAW DEPARTMENT
AT&T
SUITE 1500, 222 W. ADAMS
CHICAGO, IL 60606
chamill@att.com

Peter R. Healy
MANAGER
CLEC EXTERNAL RELATIONS
525 JUNCTION RD., STE. 6000
MADISON, WI 53717
Peter.healy@tdsmetro.com

Michael Lannon
ILLINOIS COMMERCE COMMISSION
160 S. LASALLE, SUITE C-800
CHICAGO, IL 60601
Mlannon@icc.state.il.us

Owen E. MacBride
ATTY. FOR INTERVENORS
SCHIFF HARDIN & WAITE
6600 SEARS TOWER
CHICAGO, IL 60606
omacbride@schiffhardin.com

Nancy J. Hertel
ILLINOIS BELL TELEPHONE
COMPANY
FLOOR 25D
225 W. RANDOLPH ST.
CHICAGO, IL 60606
Nancy.j.hertel@ameritech.com

Henry T. Kelly
ATTY. FOR ILLINOIS RURAL
COMPETITIVE ALLIANCE
O'KEEFE, ASHENDEN, LYONS
& WARD
30 S. LASALLE ST., STE. 4100
CHICAGO, IL 60602
Henrykelly@okeefe-law.com

Marianne McAllister
ALLEGIANCE TELECOM, INC.
9201 N. CENTRAL EXPRESSWAY
DALLAS, TX 75231
marianne.mcallister@allegiancetelecom.com

M. Gavin McCarty
VICE PRESIDENT & GENERAL
COUNSEL
GLOBALCOM, INC
333 W. WACKER DR., STE. 1500
CHICAGO, IL 60606
Gmccarty@global-com.com

Demetrios G. Metropoulos
ATTY. FOR ILLINOIS BELL TELEPHONE COMPANY
MAYER, BROWN & PLATT
190 S. LASALLE ST.
CHICAGO, IL 60614
demetro@mayerbrown.com

Stephen J. Moore
ATTY. FOR XO ILLINOIS, INC.
ROWLAND & MOORE
77 W. WACKER DR., STE. 4600
CHICAGO, IL 60601
Steve@telecomreg.com

Dennis K. Muncy
ATTY. FOR IITA
MEYER CAPEL, A PROFESSIONAL
CORPORATION
306 W. CHURCH ST.
PO BOX 6750
CHAMPAIGN, IL 61826-6750
dmuncy@meyercapel.com

Joseph D. Murphy
ATTY. FOR IITA
MEYER CAPEL, A PROFESSIONAL
CORPORATION
306 W. CHURCH ST., PO BOX 6750
CHAMPAIGN, IL 61826-6750
jmurphy@meyercapel.com

Nora A. Naughton
OFFICE OF GENERAL COUNSEL
ILLINOIS COMMERCE COMMISSION
160 N. LASALLE ST., STE. C-800
CHICAGO, IL 60601
nnaughto@icc.state.il.us

Carol P. Pomponio
XO ILLINIOS, INC.
CONCOURSE LEVEL
303 E. WACKER
CHICAGO, IL 60601
Carol.pomponio@xo.com

Morton J. Posner
REGULATORY COUNSEL
ALLEGIANCE TELECOM
OF ILLINOIS, INC.
1150 CONNECTICUT AVE., NW,
STE. 205
WASHINGTON, DC 20036
morton.posner@allegiancetelecom.com

John E. Rooney
ATTY. FOR VERIZON
NORTH/SOUTH INC.
SONNENSCHN NATH & ROSENTHAL
8000 SEARS TOWER
CHICAGO, IL 60606
jrooney@sonnenschein.com

David O. Rudd
DIRECTOR, STATE GOVERNMENT
RELATIONS
GALLATIN RIVER
COMMUNICATIONS L.L.C.
625 S. SECOND ST., STE. 103-D
SPRINGFIELD, IL 62704
dorudd@aol.com

Kevin Saville
CITIZENS COMMUNICATIONS
COMPANY
2378 WILSHIRE BLVD.
MOUND, MN 55364
Ksaville@czn.com

Kristen M. Smoot
RCN TELECOM SERVICES OF
ILLINOIS, INC.
350 N. ORLEANS ST., STE. 600
CHICAGO, IL 60654
kristen.smoot@rcn.net

Darrell Townsley
MIDWEST REGION PUBLIC POLICY
WORLD COM, INC.
205 N. MICHIGAN AVE., 11TH FLOOR
CHICAGO, IL 60601
Darrell.Townsley@wcom.com

Douglas W. Trabaris
222 W. ADAMS ST., STE. 1500
CHICAGO, IL 60606
Dtrabaris@att.com

Lester Tsuyuki
MANAGER OF TELECOMMUNICATIONS
PRIMECO PERSONAL
COMMUNICATIONS
ONE PIERCE PLACE, STE. 1100
ITASCA, IL 60143
Ltsuyuki@primeco.com

A. Randall Vogelzang
VERIZON SERVICES GROUP
600 HIDDEN RIDGE
IRVING, TX 75038
randy.vogelzang@verizon.com

John F. Ward Jr.
ATTY. FOR ILLINOIS RURAL
COMPETITIVE ALLIANCE
O'KEEFE, ASHENDEN, LYONS
& WARD
30 N. LASALLE ST., STE. 4100
CHICAGO, IL 60602
Jfwardjr@oalw.com

Nancy Wells
AT&T COMMUNICATIONS OF
ILLINOIS
620 S. 5th St.
Springfield, IL 62703
njwells@att.com

David Woodsmall
VICE PRESIDENT – LEGAL &
REGULATORY
MPOWER COMMUNICATIONS
CENTRAL CORP.
175 SULLY'S TRAIL, STE 300
PITTSFORD, NY 14534
Dwoodsmall@mpowercom.com

Dan Leary
SENIOR MANAGER OF GOVERNMENTAL AFFAIRS
VOICESTREAM WIRELESS CORP.
8550 W. BRYN MAWR AVE., FIRST FL.
CHICAGO, IL 60631
dan.leary@voicestream.com

Brett D. Leopold
SPRINT
6450 SPRINT PARKWAY, MAILSTOP: KSOPHN0212-2A461
OVERLAND PARK, KS 66251
brett.d.leopold@mail.sprint.com

Theodore A. Livingston
ATTY. FOR ILLINOIS BELL TELEPHONE COMPANY
MAYER, BROWN & PLATT
190 S. LASALLE ST.
CHICAGO, IL 60603
tlivingston@mayerbrown.com

Kevin Rhoda
ROWLAND & MOORE
77 W. WACKER
SUITE 4600
CHICAGO, IL 60601
krohda@telecomreg.com